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COMMENTS

THE LAW OF JOINT BANK ACCOUNTS
IN TEXAS

INTRODUCTION

Carrying a bank account in joint form, payable to or to the order of two or more persons, is a very common arrangement in these times. An account may be set up in this manner by the depositors affixing their signatures to a deposit contract which the bank has available for this purpose. The transaction is a simple one. Yet this transaction may have very important legal consequences, chiefly because it may be a method by which a person can dispose of his interest in the account at his death without the formalities and inconveniences associated with disposing of one’s property by will. Indeed, the joint account has been judicially recognized as serving this purpose, the court terming it the “poor man’s will.” For this reason the lawyer and the layman alike should have some knowledge of the law of joint accounts—the lawyer, so that he may utilize this knowledge in better serving his client; and the layman, so that he may appreciate the legal consequences of the action which he takes.

It is the purpose of this comment to examine the Texas law of joint accounts as it exists in the cases and the statutes. The case law on the subject has been rather sparse in this state; for this reason the comment will be initiated with a summary of the common law of joint accounts as it exists in the cases from the various jurisdictions of the country. To facilitate the discussion, the parties to a joint account will be designated from this point on as follows: Very often one depositor will furnish all the funds which make up the joint account. For the sake of uniformity and for want of a better term, this party will be referred to as the donor. The depositor who furnishes none of the funds will be termed the donee. The donor and the donee when referred to together will be termed the depositors, although only one is a true depositor. The bank which carries the account will be referred to as merely the bank. It must be remembered that the first three are purely arbitrary designations and do not accurately describe the relationship between the parties in every case.

1 In re Edwards’ Estate, 140 Ore. 431, 14 P.2d 274 (1932).
The courts of the several jurisdictions have used various theories to explain the rights of the parties in joint accounts. The difficulty which has faced the courts is in allowing the survivor to take the account absolutely on the death of the other. In meeting this difficulty, the courts have generally applied the following explanations: (1) the donor has made an absolute gift of the entire account during his life to the donee. (2) The donor has made a gift of a joint interest in the account during his life to the donee, this joint interest ripening into complete ownership at the death of the donor. (3) The donor during his life created a valid trust of the account for the benefit of the donee. (4) The rights of the parties arise from and are determined by the deposit contract. The discussion of the common law of joint accounts will proceed under the topics of gift, trust, contract, and joint tenancy, as suggested by the above specified theories which the courts have applied.

Gift

The execution of a valid gift at common law requires the presence of three principal elements. They are as follows: (1) The donor must intend to transfer his entire interest in the subject matter of the gift to the donee. This is referred to as donative intent. (2) The donor must deliver the subject matter to the donee in such a manner as to divest himself of all dominion and control over the subject matter. This may be simply called delivery. (3) The donee must accept the gift. This element will be presumed when no detriment results to the donee from the nature of the gift.

It is well settled that the donor may make a gift of the entire account to the donee when it is in joint form. Donative intent must necessarily be established, and obviously, this intent can not be inferred from the joint form of the account. To effect a valid gift of the entire fund, there must be a delivery from the donor

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5 In re Belgard's Estate, 202 Iowa 1356, 212 N.W. 116 (1927); Hickman v. Barrett, supra note 4.

6 In re Jarmakowski's Estate, 169 Misc. 465, 8 N.Y.S.2d 35 (Sur. Ct. 1938), holds that the joint form negatives any inference of a gift of the entire account.
to the donee, either actual or symbolical. In the gift of a savings account, this is accomplished by delivery of the pass book to the donee. This performs the function of stripping the donor of all dominion and control over the subject matter of the gift. However, in the case of a commercial or checking account, the delivery of the deposit book has no meaning. To effect a valid gift of the funds in a joint checking account, there must be at least an acceptance by the bank of the donor's check payable to the donee. Until this moment the donor retains a locus poenitentiae, a power to revoke, which would defeat the gift.

The gift of an interest less than the whole presents a more complicated problem than the gift of the whole, as in the case of a gift of a joint interest. First is the matter of what is sufficient evidence of the donor's intention to make such a gift. The main controversy involves whether the mere form of the account is evidence of an intention to give a joint interest. At this point it will be necessary to categorize the forms which a joint account may take. The first may be called the simple joint form. It is payable simply "to X or Y." The second may be called the joint and survivorship form. It is payable "to X or Y, either or the survivor." The third, the joint tenancy form or type, may be captioned the same as either of the two preceding, but in the body of the deposit contract will appear words which bear on the rights between the depositors to the account, such as the statement that the depositors hold the account as "joint tenants" or "joint owners" or "joint tenants, and not as tenants in common" or any similar expression. The right of survivorship may or may not be expressly set out.

The great weight of authority holds that the simple joint form and the joint and survivorship form furnish no evidence of donative intent. The rationale behind this rule is the equivocal nature of these forms. Many joint accounts are not created for the purpose of making a gift of any interest therein to the donee, but are set

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8 See note 7 supra.
10 Brown, Personal Property § 59 (2d ed. 1955).
11 Boyle v. Nat'l Union Bank, 7 N.J. Misc. 32, 144 Atl. 10 (1928).
up in this fashion for the convenience of the donor. The donee is the donor's agent and may only expend funds drawn from the account to the benefit of the donor. The simple joint form and the joint and survivorship form yield this inference as readily as they do an intent to make a gift of an interest in the account. The survivorship provision is usually included in such accounts by the bank to protect itself from a suit for wrongful payment of the funds to the survivor or to bring itself within the protection of that state's bank protection statute, these statutes often employing the term in describing the account to which they refer.

In the case of the joint tenancy form, the weight of authority holds that some probative value is to be given this form as evidence of the donative intention of the donor. This is so because expressions appear in the form which bear directly on the rights as between the donor and the donee which do not appear in the other forms. Although in the usual case these expressions are contained in printed forms furnished by the bank, this fact has been held to be immaterial. The joint tenancy form is generally held to provide at least prima facie evidence of an intent in the donor to transfer a joint interest to the donee.

The question has arisen whether the parol evidence rule would allow the introduction of extrinsic evidence to show an intention in the donor contrary to that indicated in the deposit contract. Since no intention may be gathered from the terms of the joint and survivorship form of deposit contract, the parol evidence rule clearly does not apply. The question arises in cases which involve the joint tenancy form of contract. Leading cases for both views have been handed down by the United States Court of Appeals for the District of Columbia. In the case of Matthews v. Moncrief the

16 In Cerny v. Cerny, 152 Fla. 333, 11 So. 2d 777 (1943), the court states that the joint and survivorship form is "nothing more than a banking facility." For a discussion of bank protection statutes, see Kepner, infra note 2, at 604-07. See also p. 499, infra.
17 Commonwealth Trust Co. v. Grobel, 93 N.J. Eq. 78, 114 Atl. 353 (Ch. 1921); Mardis v. Sten, 293 Pa. 13, 141 Atl. 629 (1928). But see Whalen v. Milholland, 89 Md. 199, 43 Atl. 45 (1899).
court held that the written agreement signed by both the donor and the donee was conclusive of the rights of the parties thereto, and excluded extrinsic evidence which clearly showed that the donor wished merely to establish a joint account for her convenience and had no donative intent whatsoever. The leading case for the contrary view is that of Murray v. Gadsden. In this case it was held that contrary evidence was admissible, the court applying an exception to the parol evidence rule that extrinsic evidence is admissible to show that a document which purports to be an absolute transfer of a property interest was not intended by the parties to be such. The court went on to point out that the joint tenancy form of deposit did not constitute a contract between the donor and donee inter se but was a contract between the depositors on the one hand and the bank on the other. The court agreed that no extrinsic evidence was admissible to vary the obligations of the depositors in regard to the bank and vice versa, but as between the two depositors the instrument could be nothing more than a mutual declaration of gift. This analysis of the situation seems to be correct. If only one of the parties furnishes the funds, then, viewing the deposit agreement as a contract between the two depositors, it would be without consideration. If they both made deposits, no contract would result because there would be a mere exchange of monies or of like interests therein.

The problem which originally perplexed the courts more than that of intention was that of delivery. By the terms of the deposit contract either party could withdraw the whole of the funds on deposit. Early cases held that this preserved a locus poenitentiae in the donor which would allow him to revoke the gift to the donee. These cases failed to consider that the retention of this right to withdraw the funds was not inconsistent with a gift to the donee, not of the entire funds, but of an interest in the account equal to that which the donor retained. Later cases perceived this fact and held that it was only necessary that the donor strip himself of ex-

In re Murdoch's Estate, 238 Iowa 898, 29 N.W.2d 177 (1947); Commerce Trust Co. v. Watts, 360 Mo. 971, 231 S.W.2d 817 (1950); In re Furjanick's Estate, 375 Pa. 484, 100 A.2d 85 (1953); Holt v. Boyles, 85 Utah 164, 93 P.2d 711 (1939).


WILLISTON, CONTRACTS § 115 (rev. ed. 1936).


See Raferty v. Reilly, 41 R.I. 47, 102 Atl. 711 (1918).
exclusive control of the account. This occurs when the account is created in joint form. In thus stripping himself of exclusive control of the account, the donor has stripped himself of all control over the subject matter of the gift which is the joint interest. Possession of the passbook retained in the donor becomes immaterial once the requisite donative intent is established, since it is a well established principle in the law of co-ownership of property that the possession of one of the co-owners is the possession of both. The donee has a right of access to the passbook, and any withholding by the donor is wrongful. Therefore, it has been said that the execution of the deposit contract takes the place of delivery, to the extent that delivery is required.

The gift theory, as it is known, is the predominant theory used to explain the method by which an interest in the account is created in the donee. Although a traditional element of common law gift is not strictly present, this has not led the courts to mistake the essential nature of the transaction, which is certainly one of gift. In refusing to be balked by the absence of a strict delivery, the courts have demonstrated their desire to protect the donor's intention from being defeated by technicalities and yet to truly interpret the character of the occurrence.

Trust

A few cases may be found which apply the law of trusts in order to explain the manner in which an interest passes to the donee. It has long been held that an owner of property may declare himself trustee of that property for the benefit of another and, by this act, pass the equitable title to the property to the cestui que trust. Under this doctrine, no delivery to the beneficial owner is required. Undoubtedly, it was this feature of the declaration of trust which prompted some courts to employ this rationale in

28 Barstow v. Tetlow, 115 Me. 96, 97 Atl. 829 (1916).
29 In re Winkler's Estate, 232 Iowa 930, 5 N.W.2d 153 (1942).
30 Powell, Real Property § 603 (1st ed. 1949).
33 Brown, Personal Property § 65 (2d ed. 1955).
34 See note 2 supra.
35 Scott, Trusts § 17.1 (1956).
36 Ibid.
allowing the donee's interest in the property. Thus, it has been held that where a donor creates a joint account and expresses a desire that the donee have the fund at his death, while retaining to himself the income during his life, this constituted an "unequivocal" declaration of trust for the benefit of the donee.\textsuperscript{37} The weakness of the doctrine is in the fact there is practically never a true intention on the part of the donor to create a trust and assume the capacity of a fiduciary over the account to the donee.\textsuperscript{38} For this reason the trust theory has never enjoyed widespread acceptance, most courts holding that there must be a true intention to establish a trust before one is created.\textsuperscript{39}

\textbf{Contract}

The contract theory may be said to have originated in the Massachusetts case of \textit{Chippendale v. North Adams Sav. Bank}.\textsuperscript{40} In that case, the court sustained the right of the survivor to the entire account by holding that the right of the donee survivor arose out of the deposit contract which was of the joint and survivorship form. The court employed this theory in order to avoid denial of the survivor's rights because of the testamentary aspect of his being invested with the ownership of the entire account on the death of the donor.

The contract theory has been applied in numerous cases.\textsuperscript{41} It is well set forth in a note in the Harvard Law Review where the author writes as follows:

\begin{itemize}
  \item Ladner v. Ladner, 128 Miss. 75, 90 So. 593 (1922).
  \item Kepner, \textit{supra} note 2, at 599.
  \item E.g., Norway Sav. Bank v. Merriman, 88 Me. 146, 33 Atl. 840 (1895). Maryland is the only jurisdiction which applies the trust theory to any great degree. This situation stems from a special deposit form used in that state which was prompted by the early case of Milholland v. Whalen, 80 Md. 212, 43 Atl. 43 (1899), where it was held that the form "X, in trust for X and Y, payable to either or the survivor" was presumptive evidence of an intention to create a trust. However, a true intention to create a trust is still required, and a contrary intention may be shown which will thereby defeat any interest in the donee. Pearre v. Grossnickle, 139 Md. 274, 115 Atl. 49 (1921).

  California has held that on the creation of a joint account there is a transfer in trust in favor of all the depositors, the bank acting as trustee. Booth v. Oakland Bank of Sav., 122 Cal. 19, 54 Pac. 370 (1898). This theory is open not only to the objection that there is no manifestation of intention to create a trust on the part of the donor and certainly no manifestation of acceptance by the bank of any fiduciary duties, but also to the difficulty that there is no specific res to which the bank holds legal title subject to the equitable interest of the depositors.

  Quigley v. Quigley, 85 F.2d 300 (D.C. Cir. 1936); Illinois Trust & Sav. Bank v. Van Vlack, 310 Ill. 185, 141 N.E. 446 (1923); New Jersey Title Guaranty & Trust Co. v. Archibald, 91 N.J. Eq. 82, 108 Atl. 434 (Ct. Err. & App. 1919); Cleveland Trust Co. v. Scofield, 114 Ohio St. 241, 151 N.E. 373 (1926); In re Edward's Estate, 140 Ore. 431, 14 P.2d 274 (1932); Deal's Adm'r v. Merchants' & Mechanics' Sav. Bank, 120 Va. 297, 91 S.E. 135 (1917); Wisner v. Wisner, 82 W.Va. 9, 95 S.E. 802 (1918); In re Staver's Estate, 218 Wis. 114, 260 N.W. 655 (1935).\end{itemize}
... It would seem that a better analysis of the transaction indicates that [the donee's] interest is not transferred from [the donor], either as a legal interest or as an equity, but is a legal interest directly created in [the donee] by the depository's promise to pay the [donor or the donee], as joint obligees. * * * The transaction seems, therefore, not one of legal gift from [the donor] to [the donee], but the purchase by [the donor] for [the donor and the donee] of a contract right against the bank to be held from its creation jointly by himself and [the donee]. That there may be such joint obligations entailing the right of survivorship is generally conceded.46

The donee derives his interest in the deposit through the promise of the bank, and no question of gift being involved, the intention of the depositor is immaterial.43 On the death of either, the entire obligation of the bank vests solely in the survivor by the terms of the deposit contract.44

The legal objection to the contract theory is that it equates the right to withdraw and the right to appropriate what is withdrawn. This undoubtedly was caused by the courts' failure to distinguish between a chose in action and the contract right which the donee has against the bank. The chose in action is a species of personal property which is defined as the right to receive a sum of money or other specific personal property from another, the right being one which is enforceable in court.45 The right may exist by virtue of a contract or of a tort.46 It is familiar banking law that on a person's making a general deposit in a bank, the bank gets title to the money deposited and the depositor has a chose in action against the bank based on the deposit contract.47 In the situation of a joint account, the bank takes title to the donor's money and in return obligates itself jointly and severally to the donor and the donee to pay to either of them or to the order of either the whole amount of the deposit.48 The donee is invested with a right to receive a sum of money and this right is enforceable by him in court in an action against the bank for a breach of its joint obligation.49 To this extent the right which the donee possesses is similar to a chose in action. The obligation of the bank is exactly the same. The differ-

42 Note, 38 Harv. L. Rev. 243, 244 (1924).
43 See notes 41 and 42 supra.
44 Ibid.
49 Williston, Contracts § 126 (rev. ed. 1936).
ence lies in the rights of the donee under the two situations, one where he possesses the right to receive payment and the other where he possesses a chose in action, after the bank has fulfilled its obligation and has made payment. The owner of the chose in action is invested with title to the money received. The possessor of the mere right to receive money gets no title in the money but holds it as the bailee of the person to whom the money originally belonged. When the bank pays over money to one who has the mere right to receive the money, it discharges its debt to that extent, but it has no power in discharging the debt to transfer title to that person unless he has been given the right to take title to the money by the depositor to whom the funds originally belonged.

Therefore, in the absence of a gift of this right to take title, on payment by the bank the donor is invested with the title to the money and the donee has mere possession; and any appropriation of the money by the donee to his own use would amount to a conversion.

As in the Chippendale case, quite often courts have employed the contract theory in order to give effect to the intention of the donor that the surviving donee take the entire account, when objections are raised to other common law modes which would produce this result. In the case of New Jersey Guaranty & Trust Co. v. Archibald, the court held the survivor's right to the entire account on the death of the donor was fixed by the terms of the deposit contract, thereby rendering unnecessary a finding of a formal joint tenancy in a joint account. The Oregon case of In re Edward's Estate has a similar holding, the Oregon Supreme Court finding it impossible for a formal joint tenancy to exist in a joint bank account but holding that the parties held the account in a "quasi joint tenancy" which arose out of the deposit contract. The courts of Ohio follow the contract theory because the estate in joint tenancy has been held not to exist in that state.

Wisconsin has probably the clearest expression of the contract theory in its cases on the subject. In these cases it is held that the donee is invested with a legal interest on the execution of the deposit contract, which ripens into full legal title on the death of the donor. However, he derives no equitable title to the funds without

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51 First Nat'l Bank v. Allen, 100 Ala. 476, 14 So. 335 (1893).
52 See note 42 supra.
53 Ibid.
54 In re Hutchinson's Estate, 120 Ohio St. 542, 166 N.E. 687 (1929).
55 In re Staver's Estate, 218 Wis. 114, 260 N.W. 655 (1935).
this having been made the subject of a gift to him by the donor. Unless such a gift has been made, he holds any funds withdrawn from the account in trust for the donor or his estate. The effect of this doctrine renders it indistinguishable from the gift theory, the only difference being in the name given to the interest of the donee.

The support which the contract theory has received in the past seems to be receding. Courts which formerly applied the contract theory literally have modified their language to that of gift executed through the medium of the deposit contract. The Supreme Court of Appeals of Virginia has restricted the contract theory to the point of its being without application and has substituted the theory of a gift of a joint interest. The United States Court of Appeals for the District of Columbia has openly repudiated the contract theory which it formerly applied. These decisions were inevitable as the courts became more familiar with the problem and applied more sophisticated reasoning to it.

**Joint Tenancy**

As indicated at the beginning of this paper, the end sought by many persons who carry their bank accounts in joint form is to provide a means by which the person they designate as codepositor will become the sole owner of the account on the death of the donor. To accomplish this, a present interest in the account must be created in the donee during the donor's lifetime, for if no interest passes to the donee during the life of the donor, none could pass at his death as this would clearly be testamentary and in violation of the statute of wills. In describing the interest which is created in the donee by the donor during his life, many courts have resorted to the law of joint tenancy with its incident of survivorship. The depositors are said to hold the account as joint tenants; the joint tenancy relationship attaches to any interest accruing to the account
and to subsequent deposits made thereto; on the death of either depositor, the survivor becomes the owner of the entire account by operation of the survivorship principle. By utilizing this doctrine, the courts have been able to give effect to the donor’s intentions and at the same time avoid running afoul of the prohibition against testamentary dispositions which violate the statute of wills. On the surface, this doctrine seems to take care of the matter rather handily. Yet, its application raises some legal difficulties which are not easily put to one side. To gain an idea of these difficulties, a short review of the common law of estates held in joint tenancy is in order.

The foundation on which the law of joint tenancies is based is the legal fiction that the several joint tenants hold the property as one person. This fiction leads to the requirement in creating and maintaining a joint tenancy of what is known as the four unities—i.e., the unities of time, title, interest and possession. This means that each joint tenant must have derived his title from a common source by one and the same act or instrument at one and the same time; that each must have an identical interest which entitles them to one and the same undivided possession. The legal fiction which is respected by the requirement of the four unities gives rise to the distinctive feature of joint tenancies, that of jus accrescendi or survivorship. This incident which was favored at the early common law as a means of preserving the feudal order supplies the reason for the fiction; if all hold as one, then on the death of one, his interest merely ceases to exist, and the survivor (being the remaining owner of the unified interest) becomes its sole owner. He is said to gain nothing more than he already had.

The estate in joint tenancy can only be created by the affirmative act of the grantor and never comes into existence by operation of law. As the estate in joint tenancy was favored in the eyes of the old common law, one was held to be created by any conveyance or devise to two persons, and no tenancy in common resulted unless such an intention was expressed in the instrument of conveyance.

Footnotes:

68This review is taken from 2 Walsh, Commentaries on the Law of Real Property §§ 115-17 (1947). See also 4 Powell, Real Property §§ 613-19 (1949).
This rule is no longer the law, having been changed either by statute or decision, and today the reverse is true.

A joint tenancy may exist in either real or personal property. Each joint tenant is said to own the property per my et per tout—by half and by all. In accord with the fiction of a unified ownership, each is said to own the entire property. In actuality, during their joint lives each joint tenant owns an undivided interest equal to the interest owned by each of the other joint tenants. Being a property interest, this interest may be aliened by its owner. The result of such an alienation is to sever the legal relationship of the joint tenants to the extent of the interest conveyed. Severance occurs when any of the required unities is destroyed. The result of a severance is to eradicate the incident of survivorship. The transferee takes the interest of his transferor as a tenant in common with the other joint tenants, since the unities of time and title are lacking in him. If the transferor transfers his entire interest, he, of course, has no relationship to his former joint tenants who among themselves retain their joint tenancy relationship. If he transfers less than his entire interest, what remains of his original interest is still subject to the joint tenancy. To restore the unity of interest among the joint tenants, a portion of the interest of each, measured by the amount transferred by the transferor, is severed from the joint tenancy relationship, and each becomes a tenant in common to the extent of this interest.

In applying the above rules to a joint bank account, obvious difficulties present themselves. First there is the requirement of the four unities. When the exclusive owner of funds deposits them in a bank to the joint credit of himself and another, the unities of time and title are not present. The donor and donee do not receive their title to the account from a common grantor by a common instrument; the donee receives his title from the donor. What occurs is a mere splitting of title. This defect has been held to be fatal to the existence of a joint tenancy in a joint bank account. In the leading case of Appeal of Garland, the Supreme Judicial Court of Maine in impeccable logic pointed up this flaw and further showed that the method by which these unities may be established by an owner of property who wishes to create a joint tenancy in himself and another—that of conveyance to a third party who reconveys to the two as joint tenants—had not been accomplished by the

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67 Freeman, Cotenancy and Partition § 34 (1886).
68 126 Me. 84, 136 Atl. 419 (1927). See also Harrington v. Emmerman, 186 F.2d 717 (D.C. Cir. 1950).
novation which transformed the donor's sole account into the joint one. It required legislative action in Maine to nullify the effect of this decision.\(^9\)

In the case of *Rice v. Bennington County Sav. Bank,*\(^9\) it was held that the unity of interest necessary to a joint tenancy does not exist in a joint account. The court, in quoting a dictum from a previous case, reasoned that since either of the parties could withdraw the entire balance of the deposit and appropriate it to his own use, no unity of interest existed. The court evidently assumed that the deposit contract which specified that either party might withdraw the entire balance fixed in either party the right to appropriate such a withdrawal to his own use. Such an assumption is unjustified unless there is an agreement between the depositors to that effect.\(^9\) This agreement ought not to be inferred from the deposit contract by itself, since the provisions which allow the bank to pay the entire amount to either party are present in the contract for the protection and convenience of the bank.\(^9\) Even if such an agreement were present, it has been held that an agreement between joint tenants which has the effect of destroying one of the unities does not sever the relationship.\(^9\) It is submitted that the unity of interest may be present in a joint account even though either party has the right to withdraw the entire deposit since the joint tenancy relationship would continue to exist in the cash realized on payment by the bank; the mere change in form of the property would not alter the nature of either party's interest.\(^9\)

Another problem confronting the courts which apply the joint tenancy theory is, what happens when one party during the joint lives withdraws all or a part of the funds on deposit and places them in his separate account or makes purchases with them? What are the rights of the other joint tenants against the withdrawing party in regard to the funds withdrawn and redeposited to his separate account or to the proceeds of the purchase? There is a split of authority on the effect which a withdrawal of all or a part of the funds has on the joint tenancy relationship. One line of authority holds that the relationship remains intact and attaches to property


\(^{9}\) 93 Vt. 493, 108 Atl. 708 (1920). See also, Marble v. Jackson, 243 Mass. 504, 139 N.E. 442 (1923); Morristown Trust Co. v. Capstick, 90 N.J. Eq. 32, 106 Atl. 391 (Ch. 1919); In re Edward's Estate, 140 Ore. 431, 14 P.2d 274 (1932).


\(^{12}\) See note 16 *infra.*

\(^{13}\) Tindal v. Yeats, 392 Ill. 502, 64 N.E.2d 903 (1946).

purchased with the jointly owned funds. Another holds that a withdrawal works a severance of the relationship as to the funds withdrawn. Still another holds that a party may withdraw up to his moiety in the account and may hold this in severalty, the others having no interest therein. However, if he withdraws the whole, the joint tenancy relationship is not severed.

The cases which support the first view reason that one joint tenant cannot destroy the joint tenancy by a unilateral act which is inconsistent with the rights of the others. Therefore, no severance is accomplished, and the principle of survivorship still works to vest the entire ownership of the funds in the survivor. This rule has been held to apply where either the donor or the donee withdraws all or a part of the funds and redeposits them in his separate name or makes a loan of them to a third party.

Similar reasoning has also been applied to find that the joint tenancy attaches to the proceeds of a purchase made with funds withdrawn by one of the joint tenants. The Supreme Court of Missouri in the case of Ambruster v. Ambruster took this position and stated that only by agreement between the depositors could the proceeds of a purchase made with joint funds be held in severalty; however, the presumption is against any such agreement. The California courts apply a like rule but only in regard to personalty. However, the California cases recognize that this rule is contrary to the common law since the unity of title is not present. This would seem to be so since at least the legal title must vest in the purchaser, although he would hold the property in trust for the other joint tenants to the extent of their interest in the funds by virtue of a constructive or resulting trust. Similar reasoning may be applied in holding that depositing joint funds in the separate account of one of the joint tenants severs the relationship, but cases which support the view that no severance results may be justified.

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77 In re Suter's Estate, 258 N.Y. 104, 179 N.E. 310 (1932); Moskowitz v. Marrow, 326 N.Y. 51, 167 N.E. 506 (1929); Steinmetz v. Steinmetz, 21 A.2d 743 (Ch. 1941); In re Estate of Schley, 271 Wis. 74, 72 N.W.2d 767 (1951).

78 Goe v. Goe, 134 N.J. Eq. 61, 33 A.2d 870 (Ch. Err. & App. 1943); Steinmetz v. Steinmetz, 21 A.2d 743 (Ch. 1941); In re Estate of Schley, 271 Wis. 74, 72 N.W.2d 767 (1951).

79 See note 76 supra.

80 See note 76 supra.

81 In re Harris' Estate, 9 Cal. 2d 649, 72 P.2d 873 (1937).

82 Ibid.
by the fact that the chose in action which the depositor has against the bank is so closely related to holding title to the funds themselves that it should be treated no differently.

The cases following the second view and holding that withdrawal of funds from the joint tenancy account works a severance may be explained by the above discussion. However, they do not rest their decisions on the ground that the unity of title is destroyed when the joint tenant deposits the funds in a separate account. They hold that the mere withdrawal of the funds works a severance. It is submitted that this is an incorrect analysis of the situation. Taken literally, the effect of these cases is to limit the joint tenancy to the chose in action which the depositors hold against the bank. Absent an agreement between the parties to this effect, the change in form of the property from a chose in action to a chose in possession should work no severance.83

The third view which allows one party to withdraw up to his moiety of the funds and become their absolute owner is the best from a practical standpoint. To hold that all withdrawals from an account held in joint tenancy and purchases made therewith are subject to the interest of the other joint tenants, whether that interest be joint or in common, would put such an onerous burden on the owners of the account as to make the arrangement unusable in most situations. Yet, in limiting the joint owners' withdrawals over which they may exercise exclusive ownership to the extent of their moiety, any opportunity for overreaching by one of the joint tenants is eliminated.

The exact legal machinery which allows the above is not set out in any of the cases applying this rule. However, analysis of the situation gives the obvious answer. The ordinary depositor who creates an account in joint form and intends that the donee have a property interest in the account which will ripen into full ownership on the former's death, does not intend to give up the totality of his exclusive control in the account. He certainly intends that he may purchase items for his exclusive use with the funds drawn from the account. In creating the account, if he grants to the donee the like interest which he retains in himself in order to create the joint tenancy, he must confer such rights equally on the donee. The donee, as the recipient of a gratuity, would be presumed to accept the donor's terms which place no burden on him. The result is an implied agreement between the two to treat withdrawals by either

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83 See note 76 supra.
as a partition of those withdrawals, limited by the moiety interest of the individual. Of course, in very rare instances will such an implied agreement actually exist in fact. However, in presuming such an agreement, the law would follow more closely the true intention of the ordinary depositor if he were aware of the ramifications of the law of joint tenancies and the concept of the undivided interest.

By application of the above rule, any court which strictly adheres to the technical requirements of a joint tenancy will be faced with another problem. On the severance of the interest partitioned, a severance will occur as to a like amount of the interest of the other party. This would result in order to maintain the unity of interest of the two depositors to at least a portion of the account. It is easily seen that in the case of a checking account on which many checks are written, the interests of the depositors could become exceedingly complicated and the donor’s intention toward survivorship of the entire account would be defeated. So far, no court has carried the technical doctrine of joint tenancies to this length.

As can be seen from the foregoing discussion, the attempt to apply a body of law which originated in feudal times and had its chief application to realty leaves much to be desired. The circumstances of a pasture and a bank account are only analogous at best. This realization has caused some courts to acknowledge that a true joint tenancy does not exist in a joint account. It has been suggested that perhaps a more accurate description of the interests of the parties is that of life estates with cross contingent remainderers. But this still presents the difficulty of the undivided interest plus the further complication that the transfer of all or part of the interest of one life tenant cannot defeat the remainder interest of the other without a release of that interest from the other (for which another legal fiction would have to be contrived). However, the courts have in most cases refused to be bound by these doctrinal difficulties and have given effect to the intention of the donor by allowing the donee to take the entire account at the death of the donor. Several opinions state that this intention will be given effect regardless of the legal name given to the doctrine permitting it.

84 Marble v. Jackson, 245 Mass. 504, 139 N.E. 442 (1923); In re Edward’s Estate
87 Kepner, 612 (1933).
88 O’Brien v. Biegger, 233 Iowa 1179, 11 N.W.2d 412 (1943); Burns v. Nolette, 83 N.H. 489, 144 Atl. 848 (1929); Menger v. Atero County State Bank, 44 N.M. 82, 98 P.2d 834 (1940); Vollmer v. Vollmer, 47 Ohio App. 154, 190 N.E. 588 (1933).
Legislation has been enacted in several jurisdictions which relieves the courts of the burden of supplying a name. It is apparent that the social importance of allowing this intention to prevail has been a weightier consideration in determining the decision of the courts than that of strict stare decisis.

The Law of Joint Accounts as It Exists in Texas

Texas statutes which relate directly to joint bank accounts are Articles 342-710 and 881a-23. Both of these allow the depository to make full payment of the entire account to either of the joint depositors or to his order, according to the deposit contract, before or after the death of the other. The former deals with banks and the latter with state building and loan associations and federal savings and loan associations. By their terms, neither purports to have any effect on the rights between the depositors to a joint account. Both seem to be merely for the protection of the depository. This has been the construction given them by the courts to date. Their predecessor, Article 541d, was dealt with in the case of Pruett v. First Nat'l Bank. There the heirs of the deceased donee sought to recover from the bank for wrongfully paying over to the donor the balance of the joint account. They claimed that by establishing the joint account, which was in the simple joint form, a joint interest passed to the donee which descended to them on his death. The evidence showed that the donor established the account in joint form merely as a convenience arrangement and had no donative intent. The court held that there was no provision in the deposit contract which prevented the bank from making full payment of the funds to the donor and that the bank was protected by Article 541d. The statute was not fully construed by the court, but it is clear that it considered the statute as merely giving protection to the bank, for it went on to say by way of dictum that the mere form of the deposit did not constitute a gift to the donee of any interest in the deposit. This implied construction led to an express one to that effect in the case of Reed v. Reed. This has been the majority construction given to similar statutes of other states by their courts. However, some courts have construed these statutes to have an effect on the property interests of the depositors, gen-

80 Kepner, supra note 2, at 604-12.
85 Supra, note 90.
86 O'Brien v. Bigger, 233 Iowa 1179, 11 N.W.2d 412 (1943); In re Lewis' Estate, 194 Miss. 480, 13 So. 2d 20 (1943); Dyste v. Farmers' & Mechanics' Sav. Bank, 179
erally reasoning that such a statute is recognition by the legislature of the rights which parties to joint accounts have. Such reasoning as has been applied in these cases is not of a compelling nature, and it is probable that if the question is ever presented to the Texas Supreme Court, the majority construction and the one given our statute in the Pruett and Reed cases will be followed.

As mentioned at the outset of this comment, the case law in Texas on joint accounts is rather sparse considering the amount of litigation this subject has provoked in other jurisdictions. There are only eight cases in this state which have any connection with the subject, none of which are Supreme Court cases and only one of which has any writ of error history. For this reason, each case will be discussed separately.

The earliest Texas case involving joint accounts is that of Tompkins v. McGinn. In that case both depositors had made contributions to the joint account, which was in simple joint form. At the death of one, the remaining depositor claimed the ownership of the entire account as against the decedent's personal representative. The basis of this claim was an alleged gift of the decedent's interest in the account made during his life to the survivor. The only evidence which the survivor had of this gift was his possession of the passbook to the account. The court held that the mere possession of the passbook was no evidence that it had been delivered to the survivor by the decedent in order to make a gift of his interest in the funds to the former. As to the division of the funds on deposit between the survivor and the decedent's personal representative, the court held that each should have his actual interest in the account. In the absence of any evidence on this point, each would be presumed to have an equal interest in the account.

Evidently, the survivor made no contention before the court that he had a joint interest in the account which ripened into absolute ownership on the decedent's death. Instead he seems to have rested his entire claim on a gift inter vivos of the decedent's interest in the account. This case has little meaning in regard to the problem of allowing the survivor to take the entire account when the deceased has retained an interest during his life.

The case of Benavides v. Laredo Nat'l Bank involved the claim by the plaintiff that the bank had wrongfully paid out to his father,
the donor, funds deposited in his name by the father. The plaintiff claimed that depositing the funds in an account in his separate name constituted a gift to him of the funds. The account was a savings account, and the donor had made no delivery of the passbook to the plaintiff. Also, in creating the account the donor had reserved to himself the right to make withdrawals therefrom. The court determined that the plaintiff acquired no interest in the funds by way of gift merely because the account was taken out in his separate name. To make a valid gift inter vivos of the account, the court reasoned, there must be a delivery to the donee of, in this case, the passbook to the account. The court also decided that there had been no gift of the account since the donor had reserved to himself the right to withdraw the funds in the account and had thereby retained a locus poenitentiae which would defeat any claim of a valid gift. The deposit had been made and fully withdrawn before the plaintiff had any knowledge of the transaction. This led the court to conclude that there could have been no gift because the plaintiff had not accepted it. This last ground on which the court denied the claim of gift was not necessary to the decision and is contrary to the principle that acceptance of a gift by the donee will be presumed when no burdens accompany the gift.

The court rested its decision on the rules relating to third party beneficiary contracts. It held that since the plaintiff had not accepted the right which the bank's promise to the donor had made available to him, he gained no enforceable right against the bank. Also the terms of the contract which were binding on the plaintiff allowed the promisee father to withdraw the deposit and revoke any right which the plaintiff might have against the bank. Although the court intimated that one in the plaintiff's situation is a creditor of the bank, the holding is not to be construed as an adoption by the court of the contract theory, discussed above, since the controversy here did not involve any rights between depositors but only the rights of a third party beneficiary against the bank.

Shroff v. Deaton is the first Texas case which considers the creation in the donee of a joint interest which ripens into full ownership of the account on the death of the donor. In this case a husband and wife opened a joint account in the joint tenancy form with money which was partly the separate funds of the husband and partly community. Both depositors signed the deposit contract.

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93 This seems to be majority rule on this point. See Brown, Personal Property § 63 (2d ed. 1951).

Shortly prior to the husband's death, he made a gift to the wife of his interest in the account. The husband's donative intent was proved and the fact established that he had delivered to the wife the passbook to the account, which was a savings account. The court held that the husband had made a valid gift of his interest in the account, thereby defeating the claims of his heirs to any interest they might have in the funds, either community or separate. The court went on to say by way of dictum that establishing the joint account in the joint tenancy form created in the wife a joint interest which would have caused the entire account to become hers by survivorship on her husband's death. In reaching this conclusion the court relied for support on the case of Chandler v. Kountze, which construed what was then Article 2580 to allow survivorship among joint owners if there was an agreement between them to that effect.

Article 2580 is now embodied in Section 46 of the Probate Code. This statute and its sole interpreter present some problems which have a definite bearing on joint accounts. The statute as it is now contained in Section 46 reads as follows:

§46. Joint tenancies abolished. Where two or more persons hold an estate, real, personal or mixed, jointly, and one joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owner or joint owners, but shall descend to, and be vested in, the heirs or legal representatives of such deceased joint owner in the same manner as if his interest had been severed and ascertained. Provided, however, that by an agreement in writing of joint owners of property, the interest of any joint owner who dies may be made to survive to the surviving joint owner or joint owners, but no such agreement shall be inferred from the mere fact that the property is held in joint ownership. (Italics supplied to indicate the portion of the statute which was added to Article 2580 when it was enacted as Section 46 of the Probate Code.)

The holding of the Chandler case is substantially embodied in the addition to the statute, except for the provision that the agreement between the joint owners must be in writing. The court in construing Article 2580 used these words at page 329:

While the wording of Article 2580 indicates a legislative intent to abolish the relationship of joint tenancy where it would otherwise have been created by law, including the common law doctrine of survivorship, there is nothing in the subject matter of the act which would

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100 130 S.W.2d 327 (Tex. Civ. App. 1939) error ref.
justify the presumption that the legislature intended to thereby prevent the parties to a contract, a will, or a deed of conveyance, from providing among themselves that the property in question should pass to and vest in the survivor as at common law. (Emphasis supplied.)

This language is deceptive on a brief reading. It fails to emphasize the qualification of the type of contracts, wills or deeds of conveyance to which it has reference, in saying that the parties thereto may provide for survivorship. This may lead the unwary researcher into believing that this case supports the rule that survivorship may be created by a simple contract, the question of whether the parties are joint tenants being immaterial. The Chandler case does not stand for such a rule, for the above quotation by its express words limits its application to contracts, wills and conveyances which would work a survivorship “at common law.” Since the estate held in joint tenancy is the only common law doctrine which allows survivorship, the only parties who may by agreement provide for survivorship are those to contracts, wills and conveyances which pass to the grantees joint interests in the property which is the subject of the grant. This conclusion is reinforced by the fact that the court had before it a case which involved a deed to two grantees as “joint tenants, with all the rights of such tenants at common law, including the right of survivorship.” The grantees who purchased the land from their common grantor must be assumed to have agreed to this form of conveyance. Thus, the court ruled as indicated above, and held that on the death of one of the grantees, his interest survived to the other.

The importance of the distinction between a rule which allows only true joint tenants to provide for survivorship by agreement and one which allows any type of concurrent owners to do so, lies in the facility of creating and maintaining the particular estate by which the owners hold the property. The joint tenancy as it exists at common law has the technical requirement of the four unities, and is subject to severance by destruction of any of the unities. The tenancy in common, the usual estate by which concurrent owners hold property, requires no such technicalities to its creation and existence.\footnote{4 POWELL, REAL PROPERTY § 603 (1949).} Were tenants in common able to create in themselves the right of survivorship over the commonly owned property by a simple agreement to that effect, many of the problems which beset the law of joint bank accounts would be solved. However, such an agreement which is not aided by an independent rule of
law has a definite testamentary character and would seem to fall within the prohibition against testamentary dispositions which are not in conformity with the statute of wills.

Texas has practically no case law on joint tenancies and their characteristics. One civil appeals decision holds that the four unities are requisite. The point was a minor one, and it is to be noted that the Supreme Court refused a writ of error, no reversible error, thereby casting doubt on the value of the opinion as precedent. In the country as a whole, the modern trend is to do away with the necessity of these technicalities to a valid joint tenancy. It has been held that valid joint tenancy may be established by the owner of property in himself and another by a direct conveyance to himself and the other without the necessity of a conveyance to a third party and a reconveyance. It should be noted that in the Chandler case, the court said that a conveyance from Kountze to himself and another as joint tenants had the effect of making them true joint tenants. However, this language was not necessary to the decision and is only dictum. It is doubtful that the court in Shroff v. Deaton was aware of these somewhat complicated problems when it pronounced its dictum that the joint tenancy agreement in the deposit contract would work a survivorship of the account to the wife on her husband's death.

The next Texas case to concern a joint account was that of Olive v. Olive. This was a suit by a deceased donor's executor to recover from the donee the balance of a joint account which had been on deposit at the death of the donor. The court allowed the donor's executor to recover, holding that there had been no gift of the money in the account to the donee during the life of the donor, and that any attempted gift thereof at her death was inoperative as in disregard of the requirements of the statute of wills. The court found donative intent lacking and stated that the form of the account which was of the joint and survivorship type was no evidence of such an intent. The court said that even if a donative intent had been present, the donor did not give up all dominion and control over the thing given, and this also defeated the gift. Although it appears that the donee's counsel may have brought the issue of a gift of a joint interest before the court, it only considered the contention that a gift of the entire account had been

104 Powell, Real Property § 616 (1949).
made. This case should not be considered as authority for the rule that no interest in a joint account may be created in a donee because the donor retains control over the account. To so construe this case would render it unsound and contrary to the weight of modern authority.

Adams v. Jones is the first Texas case to rely exclusively on the rule of Chandler v. Kountze to sustain the donee's claim of ownership to the entire account at the donor's death. In the Jones case, the donor was the uncle of the donee, and the funds in the account were his separate property. The deposit contract contained a strongly worded joint tenancy agreement between the donee and the donor which both signed. The court, in a terse opinion, stated that the agreement was valid by the rule of the Chandler case, and, the agreement being valid, the court would give it effect. It is clear that the court went no deeper in its reasoning than this. Such is indicated by the court's noting as an "academic" consideration that, probably, the donee received her interest in the account by way of gift. There is nothing to indicate that the court considered any of the technical issues involved in its finding.

Perhaps the most significant Texas case dealing with joint accounts to date is that of Reed v. Reed. The controversy in that case dealt with the ownership rights of a surviving wife in some building and loan shares, among other things. During his life the husband, using community funds had purchased these shares in the joint names of himself and his wife. The share contract was similar to a deposit contract of the joint tenancy form, with an express right of survivorship; both the husband and the wife were parties to the contract. On the death of the husband, his executor sought to recover from the wife the husband's community share in these deposits for the benefit of his heirs. The court allowed this recovery, noting that its decision was contrary to the dictum in Shroff v. Deaton. The decision was based on the principle that spouses cannot partition the community estate except in the manner prescribed in Article 4624a, the statute that executes the constitutional amendment of 1948 allowing partition of community property prior to termination of the marriage. The court stated that the rule of Chandler v. Kountze would not be extended to allow partition of community funds in this manner. This is undoubtedly a correct application of the law. The interest which a joint tenant has is cer-

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189 TEX. REV. CIV. STAT. ANN. art. 4624a (1951).
tainly separate property.\textsuperscript{110} Therefore, establishing an account to be held in joint tenancy would work a partition of the community funds deposited, if such a partition were allowed. However, it is not.\textsuperscript{111} This difficulty could be overcome by compliance with the provisions of Article 4624a. A partition agreement could be included in the deposit contract which would be subscribed by both spouses and acknowledged in the manner of a conveyance of realty as provided in Article 4624a. To perfect the partition against creditors, so that a community creditor could not garnish the entire account, the partition agreement could be recorded with the county clerk. Such a transaction would require little more effort than the mere creation of the account in joint form, and this particular problem presented by the Reed case could be avoided.

The Reed case raises another objection to the holding of an account by a husband and wife as joint tenants. That is the prohibition stated in Article 4610\textsuperscript{132} against a husband and wife entering into an agreement which would alter the legal lines of descent of property. For the survivorship principle to operate on the account, it would be necessary for the husband and wife to enter into a written agreement to that effect. Such an agreement comes within the literal words of Article 4610, for any expectancy which the heirs of the spouses have in the account would be cut off or at least postponed, according to the quality of the heir. However, it is doubtful that this type of agreement should come within the terms of the statute. It has been held that "... the disposition of property of married persons by any means recognized by law does not violate the provisions of Article 4610, R.C.S."\textsuperscript{133} This agreement, although theoretically not a disposition since it only removes a statutory impediment to the vesting of a certain type of estate, is a disposition, practically speaking, because it results in a situation similar in effect to a testamentary disposition. A proper construction of Article 4610 would exclude an agreement of this nature from its terms.

The latest Texas case concerned with joint accounts is that of Ottjes v. Littlejohn.\textsuperscript{144} There the donor deposited his separate funds in an account in the joint tenancy form which both he and the donee signed. Parol evidence showed that the donor had no donative intent but wished to have the account payable to both as a con-
venience arrangement. The admission of this evidence was attacked as seeking to vary the express terms of a written instrument by extrinsic evidence and, therefore, in violation of the parol evidence rule. The court held that the evidence was admissible under the exception to the parol evidence rule allowing extrinsic evidence to show the true effect intended by the parties in the execution of an instrument which purports to transfer title to property. The court correctly perceived the nature of the transaction as one which was capable of passing a present interest in the account to the donee by way of gift, had a donative intent been present.

The court went on to say that there had been no valid gift of a joint interest in the account because the donor had not delivered the passbook to the donee, thus, not stripping himself of exclusive dominion and control over the subject matter. This ground for the decision is, by modern standards, incorrect and against the weight of authority. The writ of error history of this case shows that the Supreme Court refused error, N. R. E. This action should be interpreted as a disapproval of the erroneous latter part of the opinion, if not an approval of the initial holding which is based on sound, modern authority.116

Summary

The Texas law of joint accounts may be summarized as follows:

(a) Articles 342-710 and 881a-23 do not determine any rights between depositors in joint accounts but only protect the depositaries in payment of the deposit to either depositor.

(b) The Texas courts apply the gift theory to explain the method by which the donee receives his interest in the account, whether that interest be the entire account or a partial interest.

(c) The simple joint form and the joint and survivorship form are no evidence of a donative intent on the part of the donor. The joint tenancy form is sufficient evidence of donative intent to pass a joint interest, but it is not conclusive on the issue. Extrinsic evidence may be admitted to show a different intention.

(d) The rule of Chandler v. Kountze applies to allow the depositors to hold the account as joint tenants when no problems of marital rights are present. Both parties signing a deposit contract of the joint tenancy form is sufficient to meet the requirement of Section 46 of the Probate Code that an agreement in writing be executed to allow the survivorship principle to operate. Probably no such agreement could be implied from the mere words of the simple

116 See the discussion of this topic at pp. 487-88 supra.
joint form or the joint and survivorship form. As to the technical difficulties which grow out of applying the law of joint tenancies to a bank account, it appears that the courts have not yet considered these.

(e) Community funds may not be partitioned by depositing them to an account held by a husband and wife as joint tenants. Also, there is some doubt that spouses may enter into the agreement necessary to allow full ownership of the account to survive to the survivor because of the prohibition in Article 4610 against spouses entering into agreements which would alter the legal lines of descent.

(f) The alternative holding of the Ottjes case that requires a delivery of the passbook to a savings account for a valid gift of a joint interest to the donee, has little value as a precedent in light of its writ of error history (error refused, no reversible error) and the fact that it is not supported by logic or modern authority.

CONCLUSION

The above rules are not to be considered firmly established in Texas law. What is needed is for a proper case to be presented to the Texas Supreme Court and a comprehensive decision by that Court which will settle these issues once and for all. It is impossible to predict which way that Court will decide these issues. Public policy seems to strongly favor allowing the survivor to be invested with its full ownership if such a result is intended by the donor. This policy has not been sufficient in the past to persuade the court to put to one side well established legal rules. However, there is no well established legal doctrine in the law of joint accounts which stands in the way of this policy. To be sure, there are technical objections which might influence the Court, but, on the other hand, it is to be remembered that regardless of a diversity in theory, the overwhelming majority of jurisdictions allow the survivor to become the owner of the entire account. Whatever the Court's decision may be, legislative action is always possible. It is to be hoped that in the near future the law will become fixed on these issues either by court decision or by statute, so that this commonplace transaction will be rid of the uncertainty of legal consequences which now surrounds it in this state.

David M. Woolley

110 But see Spark v. Canny, 88 So. 2d 307 (Fla. 1956).
111 In Fleck v. Baldwin, 141 Tex. 340, 172 S.W.2d 975 (1943), the Supreme Court rejected the doctrine of the tentative, or Totten, trust and held that a deposit in the form "X, in trust for Y" was no evidence of an intention to create a trust which would allow Y to take the funds on the death of X.